No. 92-757

IN THE

Supreme Court of the United States

October Term 1992

BARBARA LANDGRAF,

Petitioner,

v.

USI FILM PRODUCTS,
BONAR PACKAGING, INC., AND
QUANTUM CHEMICAL CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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August 10, 1993.

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ARGUMENT

I. THE PLAIN LANGUAGE OF THE ACT DIRECTS THAT THE ACT APPLIES TO PENDING CASES.

It is common ground that the starting point to answer the question before the Court—whether the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (the "Act"), applies to pending cases—is the language of the Act itself. *See, e.g., Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). We differ, however, on two points: First, whether the language of a statute must expressly and unequivocally state that it is applicable to pending cases before the courts may so apply it, and second, as to how the "plain language" of the Act should be read in this case.

A. The Court Should Reject Respondents' Proposed "Clear Statement" Rule.

Respondents urge that the Act cannot be read to apply to pending cases because the words of the statute are not sufficiently "clear, strong and imperative" (USI Film Products *et al.* Brief for Respondents ("USI Br.") at 5) to permit it to be applied in pending cases. According to respondents, unless Congress uses "words that are . . . of unequivocal and inflexible import, manifestly evidencing a Congressional intent" in favor of application of a new statute to pre-Act conduct, the statute does not apply to pending cases. (USI Br. at 5)

Precedent does not support respondents' argument. In fact, not only would respondents' proposal bring about a new and dangerous principle of statutory construction, it would also require overruling *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990). Under *Bonjorno*, "the most logical reading" of the statute governs. There, the Court concluded that the statute at issue did apply to certain preexisting claims, notwithstanding that it did not do so clearly and unequivocally. The proposal is also inconsistent with *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988).[1] We submit that the Court's traditional rule of statutory construction is the correct one and should be followed here.

B. Sections 109(c) and 402(b) Are the Exceptions to Which Section 402(a) Refers.

We contend that in order to give meaning to sections 109(c) and 402(b), which are admittedly prospective, section 402(a) must be read to mean that the Act applies to pending cases; otherwise, sections 109(c) and 402(b) would be mere surplusage. Specifically, we argue that sections 109(c) and 402(b) are the

[1] To be sure, there may be circumstances, such as Eleventh Amendment abrogations, that require that Congress legislate with an unusually high level of clarity and precision as to what it intends, but this case does not present such a circumstance.

sections to which the phrase "except as otherwise specifically provided" in section 402(a) refers. (Brief for Petitioner ("Pet. Br.") at 8-10)

Respondents disagree. They argue that the "except as otherwise specifically provided" language in section 402(a) is a reference to section 102(a)(2) of the Act and section 108 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (1990) (the "ADA"), which, read together, provide that claimants who file suit under the ADA when it became effective on July 26, 1992, eight months after the Act, would be entitled to seek compensatory and punitive damages, and that the exception therefore guarantees that ADA claimants would not be entitled to those remedies until then. (USI Br. at 11) Leaving aside the fact that not a single one of the courts that has struggled with the question sub judice has come up with such a novel interpretation, respondents' reading is wrong for the following reasons:

First, it is illogical to suppose that Congress was referring to some other statute when it was setting the effective date of the Act. Section 402(a), by its terms, must refer to an exception within the Act itself. It makes no sense to search the ADA, or any other statute for that matter, for the exception to which the language in the Act refers. Otherwise, courts conducting a plain language analysis of a statute with language similar to that in section 402(a) would be forced to search any and all statutes relating even remotely to the statute at issue to determine whether there are any exceptions to that statute.

Second, section 102(a)(2) provides an additional remedy for violations of other statutes, and is only triggered when a statute both applies and is violated. Section 402(a) is unnecessary to accomplish the purpose suggested by respondents and their amici. Because the right to damages obviously does not lie if there is no cause of action, Congress simply would not have made the effective date of the ADA the exception to which the qualifying language of section 402(a) refers.[2]

[2] Respondent USI attempts to analogize this case to *United States v. Wurts*, 303 U.S. 414 (1938) (USI Br. at 11 n.5), but respondent draws the wrong

C. The Phrase "Take Effect Upon Enactment" Does Not Stand By Itself.

Respondents USI and Roadway Express ("Roadway") argue that courts have construed the language "take effect upon enactment" to be prospective only, and, since Congress is presumed to have known about and adopted prior judicial interpretations of similar language, Congress must have intended the same result by using that language here. (USI Br. at 14-15; Roadway Express, Inc. Brief for Respondents ("Roadway Br.") at 14-16) That argument ignores ours. We argue that that phrase, when read together with its qualifying clause ("except as otherwise specifically provided . . .") and two explicitly prospective sections, makes it clear that the statute on the whole applies to pending cases. It is not necessary for the Court to decide what that phrase means when it stands alone, because it does not stand alone here. In any event, respondents' reading of the cases is wrong.[3]

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analogy. In *Wurts*, the Court held that the statute of limitations in the Revenue Act of 1928 began to run from the date of payment, not the date when the refund was erroneously allowed. The Court reasoned that any other reading would have meant that the statute of limitations would begin to run prior to the accrual of the right. *Wurts*, 303 U.S. at 418. The correct analogy to *Wurts* is that, just as it made no sense for a statute of limitations to run before a right accrued, it likewise makes no sense to assume that section 402(a) was necessary lest a remedy attach before a right, because no rational court could conclude otherwise.

[3] *See Yakim v. Califano*, 587 F.2d 149, 150 (3d Cir. 1978) ("no explicit direction on the retroactivity issue" in the Black Lung Benefits Reform Act of 1977 from the phrase "shall take effect on the date of the enactment of this Act"; other language in the act indicated that the act was to apply prospectively to court cases as opposed to administrative hearings); *Leland v. Federal Ins. Adm'r*, 934 F.2d 524, 527 (4th Cir.) (the language in the Upton-Jones amendment to the National Flood Insurance Act—"shall become effective on the date of enactment of this Act"—does not alone "expressly provide for retroactive application"; court applied *Bowen* analysis to find the act applied prospectively), *cert. denied*, 112 S. Ct. 417 (1991); *Jensen v. Gulf Oil Ref. & Mktg. Co.*, 623 F.2d 406, 409 (5th Cir. 1980) ("take effect on the date of enactment" was not dispositive; court applied *Bradley* analysis to find the act applied prospectively); *Sikora v. American Can Co.*, 622 F.2d 1116, 1120 (3d Cir. 1980) (both interpretations of "take effect on the date of enactment" in an amendment to the ADEA were

D. Sections 109(c) and 402(b) Are Not Statutory "Insurance" Provisions.

Respondent Roadway claims that sections 109(c) and 402(b) are statutory insurance policies—in the nature of wearing a belt with suspenders—inserted by Congress to ensure that at least certain sections of the Act would be applied prospectively and therefore the Court should, essentially, ignore them. (Roadway Br. at 18) Citing three Supreme Court cases, Roadway argues that this Court has adopted as a principle of statutory construction the notion that the inclusion of redundant provisions constitutes nothing more than statutory insurance policies. (Roadway Br. at 19 n.5)

None of the cases cited by Roadway, however, stand for this proposition. In *County of Washington v. Gunther*, 452 U.S. 161, 169-70 (1981), this Court found that the Bennett Amendment to Title VII immunizing pay differentials "authorized" by the affirmative defenses in the Equal Pay Act was not redundant of the same affirmative defenses in section 703(h) of Title VII, but was intended to ensure that the affirmative defenses in both statutes were construed *in pari materia*. That consideration has no application here. In *Massachusetts v. Morash*, 490 U.S. 107, 114 n.9 (1989), this Court found that there were differences in the partially overlapping provisions at issue sufficient to foreclose any redundancy argument. That consideration has no application here. Finally, in *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 839 (1988), this Court held that an amendment to ERISA was not duplicative of an original section of ERISA because Congress could have had a different purpose—clarifying its original intent—as to the original provision. Moreover, this

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plausible; using *Bradley* analysis, court applied statute prospectively); *Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1140 (4th Cir. 1980) (the language "shall be effective on the date of enactment" alone did not direct application of the act to pending cases nor did it require prospective application; court relied on other language in the act and the legislative history to find the act applied prospectively); *Schwabenbauer v. Board of Educ.*, 667 F.2d 305, 310 n.7 (2d Cir. 1981) (citing *Condit*).

Court simultaneously stressed the need to avoid constructions that would make a provision truly redundant. The Court stated:

> "It is this sort of redundancy—*i.e.*, the suggestion that Congress intentionally adopted, at a single time, two separate provisions having the same meaning—that calls a particular statutory interpretation into question."

Id. at 839 n.14. Thus, far from supporting respondents' "insurance policy" argument, those cases undermine it.[4]

II. RESPONDENTS' RELIANCE ON LEGISLATIVE HISTORY IS MISPLACED, AND IN ANY EVENT THEIR INTERPRETATION IS WRONG.

A. The Plain Language of the Act Controls, Not the Origin of Section 109(c).

Roadway argues that the fact that section 109(c) prohibits application of the Act to certain pending cases does not indicate

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[4] We note, too, that, if section 402(b) is, as respondents claim, an "insurance" policy, there would be no need for that provision to begin with the qualification "[n]otwithstanding any other provision of this Act".

Further, the importance of reading the exceptions as stating a rule different from the general rule of section 402(a) is especially underscored by the use of the term "otherwise", which specifically indicates that exceptions treat the statute's applicability differently, or "otherwise", from the general rule.

Respondent USI argues that sections 109(c) and 402(b) could be redundant for emphasis and that the Act is already redundant because section 110(b) "needlessly restates section 402(a)". (USI Br. at 11-12) Section 110(b) provides that "[t]he amendment made by this section shall take effect on the date of the enactment of this Act"; section 402(a) provides that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment". The operation of the phrases when read in context, however, is quite different if the Act does not apply to pending cases. Sections 110(b) and 402(a) will be duplicative whether the Act does or does not apply to pending cases. The same is not true with sections 109(c) and 402(b); sections 109(c) and 402(b) will be redundant only if the Act applies prospectively. Thus, to the extent that any inference can be drawn from the duplicative wording in 110(b) and 402(a), the sole possible inference is that the duplication was a mistake. No such unavoidable inference can be drawn from the language of sections 109(c) and 402(b).

that the remainder of the Act applies to pending cases because this provision was originally inserted in a version of the Act that was "expressly retroactive". (*See* Roadway Br. at 23) It is a firm rule of statutory construction, however, that when the language of a statute is clear, courts look to the statute's plain language, not, as respondents suggest, to the origin of each word and clause of the statute. *See Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992).

Moreover, respondents' argument is at odds with the facts. Although the language of section 109(c) originated in a version that explicitly applied to cases pending on the date of enactment, Congress not only chose to retain the section when such "expressly retroactive" language was deleted, but also added section 402(a) with its "except as otherwise specifically provided" language. In addition, Congress added section 402(b), and both houses of Congress debated the propriety of section 402(b) at length, and sometimes acrimoniously, prior to its passage, long after the "expressly retroactive" language was deleted. *See* 137 Cong. Rec. S15950-68 (daily ed. Nov. 5, 1991); 137 Cong. Rec. H9505-58 (daily ed. Nov. 7, 1991).[5] In fact, when the section was

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[5] The Equal Employment Advisory Council argues that no inference should be drawn from section 402(b) because Senator Murkowski, its drafter, made a statement to that effect. (EEAC Br. at 14 n.5) Senator Murkowski also wrote and stated several times, however, that he believed the Act would apply to pending cases, thus necessitating section 402(b) in order to exempt the Wards Cove Packing Company. In his "Dear Colleague" letter of October 15, 1991, proposing this section, Senator Murkowski stated:

> "As presently drafted, Section 22 of S. 1745 [identical to section 402(a)] would apply retroactively to all cases pending on the date of enactment, regardless of the age of the case. My amendment will limit the retroactive application of S. 1745 with regard to disparate impact cases for which a complaint was filed before March 1, 1975 and for which an initial decision was rendered after October 30, 1983. To the best of my knowledge, *Wards Cove Packing Co. v. Atonio* is the only case that falls within this classification."

Letter from Murkowski to Colleagues of Oct. 15, 1991, *reprinted in* 137 Cong. Rec. S15954 (daily ed. Nov. 5, 1991). Later, during the debate over reinserting section 402(b) when it had been erroneously omitted, Senator Murkowski argued

inadvertently omitted from the Senate version, a second protracted debate ensued before it was reinserted. It cannot be said, therefore, that Congress did not know precisely and exactly what it was doing, or that it followed this course of action while knowing it to be meaningless.[6]

B. President Bush's Veto of the 1990 Civil Rights Act Does Not Negate the Plain Language of the 1991 Act.

Respondents find support for the Act's prospective application in the fact that President Bush vetoed the 1990 Act. Because the President vetoed the 1990 Act in part because of the "unfair retroactivity rules", they argue that the 1991 Act should not be similarly interpreted. (*See* USI Br. at 15; Roadway Br. at 19) However, such an argument, if there is any relevance to it at all, ignores both the text of the 1990 Act and the reasons for the President's objections to it. President Bush's veto message referred to a memorandum written by Attorney General Thornburgh, which, the President said, more fully explained the reasons for his veto. 26 Weekly Comp. Pres. Doc. 1632 (Oct. 22, 1990). The Thornburgh Memorandum stated that the 1990 Act "unfairly applies the changes in the law made by S. 2104 to *cases already decided*". Attorney General Thornburgh's Memorandum for the President (Oct. 22, 1990) (Appendix A to petitioner's main brief) (emphasis added). Thus, it was obviously the 1990

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that "[r]etroactive application of a new standard of law is unfair and perhaps unconstitutional. . . . It is unfair for Congress to change the rules at this time and apply the case to that that arose in 1971". 137 Cong. Rec. S15953 (daily ed. Nov. 5, 1991).

[6] Roadway contends that, in determining the meaning of section 402(a), "retroactivity is not the only statutory alternative" to the "unambiguous prospectivity provisions" in sections 402(b) and 109(c). (Roadway Br. at 18) Instead, Roadway suggests a third alternative; that Congress *intended* section 402(a) to be *ambiguous*, purposely leaving it up to the courts to resolve its effect (by reference to default presumptions which, Roadway asserts, Congress thought were unclear). (Roadway Br. at 18 & n.5) It is wholly contrary to the basic principles of statutory construction, however, to assert that Congress included in a statute a provision that simply has *no* meaning or operative effect.

Act's "super-retroactivity"—its reopening of final judgments, not its application to pending cases--that led the President to characterize it as containing "unfair retroactivity rules".

C. The "Drafting Path" of the Act Does Not Negate the Act's Plain Language.

Respondents argue that the "drafting path" of the Act moved away from explicit retroactivity language, thereby rendering the Act wholly prospective. (USI Br. at 15-17) We note, however, that the "drafting path" only moved away from the application of the Act to final judgments—Congress clearly rejected the explicit prospective language. (*See* Pet. Br. at 15-20)

What is apparent from the drafting path is that members of Congress could not overcome a veto of the type of super-retroactivity language contained in the vetoed 1990 Act (which would have reopened final judgments) and that the purely prospective language contained in the Administration's proposals drew only negligible support in Congress. Contrary to respondents' argument, the Act's "drafting path" does not support its prospective-only interpretation.

III. APPLICATION OF THE ACT TO THIS CASE DOES NOT IMPLICATE RESPONDENTS' SUBSTANTIVE RIGHTS, NOR DOES IT GIVE RISE TO CONSTITUTIONAL CONCERNS, NOR WOULD IT BE MANIFESTLY UNJUST.

Respondents put forth a number of arguments why, assuming *arguendo* that the analysis in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), is still valid, application of the Act to pending cases and to this case in particular would be manifestly unjust. None of those arguments has merit.

A. Application of Section 102 of the Act Would Not Be Manifestly Unjust.

At the heart of respondents' argument, expressed several different ways, is the proposition that the Act should not be applied so as to give petitioner an opportunity for compensatory and punitive damages because to do so would affect respondents'

"substantive rights". Respondents say that the Act "change[s] the consequences of actions taken before [its] existence", that the Act is one "regulating" and "guiding" human conduct, that it increases their "substantive liabilities" and affects their "substantive obligations" and that it adds "a new cause of action, premised upon injuries not even recognized under Title VII". (USI Br. at 21, 25-36) Each of these characterizations, none of which is accurate, is made in order to bring this case within the proposition of law that, whereas statutes affecting remedies and procedures can be given effect in pending cases, statutes affecting vested rights should not be so applied where it would work a manifest injustice to do so.

In order to reply to respondents' argument, we must first reply to their characterizations. The sections of the Act that affect petitioner, those regarding damages and jury trial, do not "regulate human conduct" nor do they create a new cause of action or create "substantive liabilities". They simply increase the remedy for conduct that has been unlawful for almost thirty years and they also require a new decision-making mechanism. There should be no mistake about it—the conduct in which USI Film Products engaged was and has been clearly unlawful since at least 1965 when Title VII went into effect.[7] Respondents have no "settled right" to disobey the law nor do they have a right to decide whether to obey the law if the cost of compliance would be greater than the cost of violation. *See United States v. Marengo County Comm'n*, 731 F.2d 1546, 1554 (11th Cir.) (no governmental entity has a "vested right" to continue practices validly prohibited by Congress), *cert. denied*, 469 U.S. 976 (1984). The notion, which finds mistaken support in *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992), *petition*

[7] Further, intentional sexual discrimination was likewise actionable under general Texas tort law before November 21, 1991. *See Bushell v. Dean*, 781 S.W.2d 652, 657 (Tex. App. 1989) (affirming finding of intentional infliction of emotional distress based on sexual harassment), *rev'd on other grounds*, 803 S.W.2d 711 (Tex. 1991); *Tidelands Auto. Club v. Walters*, 699 S.W.2d 939, 942 (Tex. App. 1985) (setting out elements of tort of intentional infliction of emotional distress).

for cert. filed, 61 U.S.L.W. 3446 (Dec. 3, 1992) (No. 92-977), that citizens should have the right to make an economic cost-benefit analysis before deciding whether to obey a given law is not only destructive of the civil rights laws, but is also ultimately destructive of all law—indeed, it is flatly inconsistent with the concept of ordered liberty. Let us be clear. It may well be the case that citizens do perform such a cost-benefit analysis before deciding whether to obey or break the law. But they do not have a judicially enforceable *right* to opt for disobedience whenever that analysis suggests that it would be economically beneficial to do so—a sort of economic laissez-faire approach to obedience to the law. They have no right whatsoever to break the law, and yet that is where respondents' argument ineluctably leads.

Respondents contend that it would be "unjust" to apply section 102 to them in this case. They argue that they never had an opportunity to "adjust their internal regulation of human conduct" because such an "effort, and the resources committed to it, is affected by the source and degree of liability involved". (USI Br. at 26-27) In other words, if respondents had known that it might cost them up to $300,000 if they violated the civil rights laws, instead of merely back pay, they might have tried harder to obey them.[8] Such a result (that is, increasing the remedies for violating the law and changing the decision-making mechanism) is neither unlawful, unjust nor morally unfair.

Respondents further argue that applying section 102 to this case would be manifestly unjust because the court would either have to "examine all over again the facts of Petitioner's claim" or "bind Respondents to the litigation tactics and judgments they made in a proceeding in which matters such as punitive damages and compensatory damages were not at issue and in which the trier of fact was an experienced Federal judge, not a jury". (USI Br. at 32) The argument is not compelling. Petitioner's case will

[8] There is a factual problem with this argument. Respondents were also subject to state-law liability for intentional infliction of emotional distress, and they clearly had no "settled expectation" at the time they engaged in the offending conduct that the statute of limitations would run with respect to such a claim, which is unfortunately what happened here.

not have to be examined all over again, because "an issue once determined by a competent court is conclusive". *Arizona v. California*, 460 U.S. 605, 619 (1983). Here, there was a finding by a competent court that Ms. Landgraf was sexually harassed, that the harassment was sufficiently severe to support a hostile environment claim, and that USI failed to take prompt remedial action to alleviate the harassment. (*See* Pet. Br. at 4; *see also* Joint Appendix at 11) These findings will be binding on the jury on remand, obviating any need for a reexamination of the facts underlying petitioner's claim.

Respondents' alternative contention, that it would be unfair to bind them to the litigation choices they made when presenting their defense to a judge, and not a jury, is similarly flawed. (USI Br. at 32) This contention is foreclosed by this Court's decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). Under the law of the case, applicable here, as under the doctrine of collateral estoppel applicable in *Parklane Hosiery*, the only relevant inquiry, in addition to whether the issue was actually litigated, is whether the respondent had "'a full and fair opportunity to litigate'". *Arizona v. California*, 460 U.S. at 619 (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). Respondents did, as their brief itself recognizes. (USI Br. 32) USI received and responded to plaintiff's allegations, defended them at trial, and fully briefed them on appeal. There is no manifest injustice in estopping respondents from disputing on remand the facts already found by a competent court.

B. Section 102 Does Not Increase Respondents' Substantive Obligations, nor Create a New Cause of Action.

Respondents assert that section 102 affects substantive rights and obligations by creating a new cause of action, premised upon new injuries, and thus it must be given prospective effect only. (USI Br. at 28-31) In particular, respondents argue that "[t]he substantive rights for plaintiffs under Title VII before the enactment of the Civil Rights Act of 1991 did not include the

right to damages for tort-like personal injuries". (USI Br. at 29)[9] This argument confuses substantive rights and damages. The substantive rights protected by Title VII are the rights not to be harassed or discriminated against in the workplace on account of one's status; violations of those rights give rise to a cause of action for damages. Expansion of the potential damages allowable to redress a violation of one's preexisting rights is not the same as imposition of a new cause of action.[10]

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[9] In making this argument respondents rely on this Court's recent decision in *United States v. Burke*, 112 S. Ct. 1867 (1992). (USI Br. at 28-31) That reliance is misplaced, for the reasons discussed in the brief for the United States and the Equal Employment Opportunity Commission ("EEOC") as amicis curiae supporting petitioners ("U.S. Br."), at footnote 12.

[10] Respondents also maintain that retroactive application of section 102 would be unjust because Congress drew no distinction between compensatory and punitive damages, and the ex post facto imposition of punishment is unjust. (USI Br. at 33) As the amicus brief for the United States and the EEOC notes (U.S. Br. at 23-24 n.13), the issue of whether a distinction should be drawn between compensatory and punitive damages is not properly before the Court. But, because respondent USI and the Equal Employment Advisory Council raise the issue, we briefly respond. The possibility of punitive damages raises no ex post facto or due process concern.

As long as application of the Act to pending cases is supported by a rational legislative purpose, the Due Process Clause will be satisfied. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *see also United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). If there is a regulatory purpose to which the punitive damages may rationally be connected, and the punitive damages do not appear excessive in relation to this regulatory purpose, the punitive damages are regulatory, and will not violate the Due Process Clause. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). Similarly, the ex post facto analysis turns on whether the damages provisions are regulatory or seek to impose punishment. *See De Veau v. Braisted*, 363 U.S. 144, 160 (1960) (plurality opinion).

Such a rational regulatory purpose exists here. Neither the explicitly remedial compensatory damages provisions, nor the explicitly procedural jury trial right of section 102, can be construed as being "for the purpose of punishment". *See Bell v. Wolfish*, 441 U.S. 520, 538 (1979). The punitive damages provisions pass rational review as a regulatory device to encourage plaintiffs to bring cases and to deter other employers, thereby increasing the

Moreover, the obligation to avoid the conduct below already existed and was not, contrary to what respondents proclaim, "new". (*See* USI Br. at 28) As Justice O'Connor notes,

> "even before the 1991 amendments Title VII reached much more than discrimination in the economic aspects of employment. The protection afforded under Title VII has always been expansive, extending not to just economic inequality, but also to 'working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers' and 'demeaning and disconcerting' conditions of employment".

United States v. Burke, 112 S. Ct. 1867, 1881 (1992) (O'Connor, J., dissenting) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67 (1986)).

Ultimately, respondents' argument that the Act imposes new substantive obligations fails. Respondents do not, and cannot, point to a single provision of section 102 that requires them to act in any way differently after November 21, 1991, than before it,

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impact and effectiveness of the law. The strict limits placed on damages under section 102(b) further demonstrate that the purpose of these damages is not to "punish" employers but to encourage victims to enforce their rights. For instance, section 102(b)(3) places a cap on both compensatory and punitive damages, varying with the size of the employer.

Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966 (2d Cir. 1985), relied upon by the Equal Employment Advisory Council in its amicus brief (at 29), is clearly distinguishable. The court in *Louis Vuitton* refused to apply the treble damages provision of a trademark counterfeiting act to a pending case because of potential ex post facto and due process problems. *Louis Vuitton*, 765 F.2d at 971. Unlike the case here, however, the court found that the legislative history demonstrated that "Congress intended that the Act be applied only prospectively". *Id.* at 972 n.2. Also, the court's evaluation whether the statute was intended to punish was influenced by the fact that the treble damages were mechanically applied, not adjusted based on defendant's conduct. *Id.* at 972. In contrast, the amount of a jury verdict for punitive damages is subject to the jury's exercise of discretion.

or a single provision that imposes liability for conduct that was lawful before November 21, 1991.

IV. A PRESUMPTION THAT LAWS APPLY TO PENDING CASES, ABSENT MANIFEST INJUSTICE, IS GOOD POLICY AND SHOULD BE RETAINED.

A. The *Bradley* Rule Is a Fair and Workable Standard.

Contrary to respondents' assertions (USI Br. at 19-21), case law does not show that *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), is unworkable or that *Bradley* generated confusion among the lower courts. *Bradley* had been applied by courts without difficulty for twenty years, and until Justice Scalia's concurrence in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 840 (1990), no court had cast doubt on *Bradley*'s historical premise. While the "apparent tension" between *Bradley* and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), has created uncertainty among the lower courts as to what law to apply,[11] as the cases in Appendix E to Ms. Landgraf's petition for certiorari demonstrate, the *Bradley* presumption itself has provided a clear, fair and workable standard.[12]

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[11] As discussed at length in petitioner's opening brief, this tension is more apparent than real. (Pet. Br. at 27) Thus, as explained in *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985):

> "'The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional.' [quoting and citing *Bradley*] This limitation comports with another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect."

Given this understanding of *Bradley*, the result in *Bowen* is explicable as an instance in which it would have been manifestly unjust to have retroactively applied the statute at issue, which changed Medicare reimbursement standards. Since hospitals had provided medical services in reliance upon the former standards, their right to reimbursement under those standards had become unconditional.

[12] USI offers no evidence in the case law for its assertion that *Bradley* is

B. *Bradley* Is the Right Rule.

Bradley is not only workable, but it is the correct general rule. The *Bradley* standard allows courts to evaluate the parties' potentially vested rights in the course of deciding whether a new law should apply to pending cases, and yet still provides a clear general rule as to the law to apply: the court applies the law in effect at the time it renders a decision. The *Bowen* rule, if applied more broadly than as an example of "manifest injustice" under *Bradley*, could result in substantial unfairness. The rights of some litigants whose cases are currently pending may be determined, for example as here, according to a legal regime repudiated by Congress, while the rights of other litigants would be determined under the legal regime chosen by Congress.

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an unworkable rule that has created judicial confusion, nor is there any such evidence. *Bradley* has been applied by the courts for close to twenty years, in a wide variety of contexts, with no apparent difficulty. *See, e.g., United States v. 6.93 Acres of Land*, 852 F.2d 633, 635-36 (1st Cir. 1988) (amendment to Equal Access to Justice Act); *Black Hills Power & Light Co. v. Weinberger*, 808 F.2d 665, 672 n.5 (8th Cir.) (Competition in Contracting Act of 1984), *cert. denied*, 484 U.S. 818 (1987); *Hyatt v. Heckler*, 757 F.2d 1455, 1458-59 (4th Cir. 1985) (Social Security Disability Benefits Reform Act of 1984); *United States v. Angiulo*, 755 F.2d 969, 970-74 (1st Cir. 1985) (Bail Reform Act of 1984); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1553-55 (11th Cir.) (1982 amendment to Voting Rights Act), *cert. denied*, 469 U.S. 976 (1984); *Memorial Hosp. v. Heckler*, 706 F.2d 1130, 1136 (11th Cir. 1983) (amendment to Medicare provisions of Social Security Act), *cert. denied*, 465 U.S. 1023 (1984); *Central Freight Lines, Inc. v. United States*, 669 F.2d 1063, 1069-70 (5th Cir. 1982) (Motor Carrier Act of 1980); *Coca-Cola Co. v. Federal Trade Comm'n*, 642 F.2d 1387, 1390 (D.C. Cir. 1981) (Soft Drink Interbrand Competition Act); *Marshall v. Sink*, 614 F.2d 37, 38 n.1 (4th Cir. 1980) (Federal Mine Safety and Health Amendments Act of 1977); *United States v. Elrod*, 627 F.2d 813, 819 (7th Cir. 1980) (Civil Rights of Institutionalized Persons Act); *Chamberlain v. Kurtz*, 589 F.2d 827, 835 (5th Cir.) (amendment to Internal Revenue Code), *cert. denied*, 444 U.S. 842 (1979); *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 580 F.2d 698, 699-700 (D.C. Cir. 1978) (Nuclear Non-Proliferation Act of 1978); *United States v. North Carolina*, 587 F.2d 625, 626 (4th Cir. 1978) (executive branch reorganization approved by Congress), *cert. denied*, 442 U.S. 909 (1979).

Indeed, Judge Easterbrook of the Seventh Circuit justified the *Bradley* rule in another context on precisely the grounds that *Bradley* best effectuates sound Congressional policy: "There must be a rule of decision, and the one in force at the time the court disposes of the case is the one the legislature deems best for adjusting entitlements." *United States v. Kimberlin*, 776 F.2d 1344, 1346 (7th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986). And, in discussing whether to apply the Bail Reform Act of 1984 to pending cases, Chief Judge Breyer of the First Circuit noted: "Given these purposes [of the statute], it is difficult to see why Congress would not want the new law to apply to those incarcerated at the time it was enacted." *United States v. Angiulo*, 755 F.2d 969, 971 (1st Cir. 1985). Application of the *Bowen* rule—as a general rule, rather than as a special case of "manifest injustice"—would not eliminate uncertainty because, as Justice Scalia's concurrence in *Bonjorno* admits, that rule leaves many important matters unclear. *Bonjorno*, 494 U.S. at 857. To the extent that *Bonjorno* rule is applied to deprive litigants of new rules decided by Congress, its application would cause a great number of cases to be decided for years to come according to rules Congress has abandoned. Moreover, confusion between the two lines of cases would be unavoidable.

Respondents also argue that "[a] presumption of retroactivity is a presumption that human actions may be given consequences that did not exist, and thus were not known, when the actions occurred". (USI Br. at 21) This argument may have applicability when a new law renders unlawful conduct that was legal when engaged in, but certainly not here, where petitioner merely seeks full compensation for conduct that, as we have noted, has been unlawful since 1965. While it is true that petitioner is now entitled to fuller compensation for respondents' unlawful conduct, such enhancement does not run afoul of any constitutional or equitable constraints on the enhancement of remedies. Respondents had no matured or unconditional right to expect that they would not have to remedy fully the injuries caused by their unlawful acts.

Respondents further argue that the manifest injustice inquiry of *Bradley* will allow courts to make decisions based purely on

unfettered policy preferences. (USI Br. at 22) This argument ignores two crucial facts. First, even under Justice Scalia's proposed rule, courts still would be forced to decide whether to apply a new statute to a pending case. Courts would have to start from scratch in applying this proposed rule, while application of *Bradley* is supported by a century and a half of precedent. There is more room for policy preferences when applying a brand-new rule without a substantial body of case law interpreting it than when applying a rule with well-articulated contours. Second, *Bradley*'s manifest injustice inquiry protects against "unfettered policy preferences". Courts do not make decisions under *Bradley* based on their particular policy preferences, but based on whether justifiable expectations are overturned, or whether vested rights are infringed.

In addition, respondents perceive a danger that, absent a presumption against retroactivity, there will be no constraints (except the Constitution) upon Congress's exercise of power. (USI Br. at 23) But respondents recognize that Congress could explicitly make legislation retroactive if it chose to do so. Thus, to that extent, there are no constraints on congressional power to begin with. It is only when Congress fails to exercise its power to make legislation retroactive that a presumption applies. In any event, the argument ignores the manifest injustice aspect of the *Bradley* analysis, which acts as a limit on the reach of retroactive legislation.

Finally, respondents argue that the use of the *Bradley* presumption undermines the administration of justice. Respondents object to two things: that courts will be required to engage in individual determinations of "manifest injustice", and that people will be subjected to unanticipated liabilities (the obligation to pay full compensation for undeniably unlawful past conduct). (USI Br. at 23-24) The latter point is amply taken into consideration by *Bradley*, since the manifest injustice analysis will not permit the imposition of liability if the defendant's conduct conformed to the law in effect at the time of the conduct, and there is no matured or unconditional right to avoid paying full relief for conduct that did not conform to the law.

The former point underestimates both the ability of the courts to engage in individualized, fact-specific inquiries (which, in any case, would be done on a section-by-section basis), and the value of such an inquiry. Adopting any other approach could come at the cost of fairness. Retaining the *Bradley* presumption would allow considerations of fairness to affect decisions, quite properly, in instances where adopting the *Bowen* presumption would not.

CONCLUSION

For the reasons set forth above and in petitioner's brief on the merits, petitioner respectfully requests that this Court remand her case to the court of appeals for an order directing the district court to conduct a jury trial on damages.

August 10, 1993.

Respectfully submitted,

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